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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,) No. CR08-477 DLJ
Plaintiff,) GOVERNMENT'S REPLY TO
v.) DEFENDANTS' POINTS AND
EDITH NELSON) AUTHORITIES REGARDING COURT-
a/k/a EDITH HONRUBIA NELSON,) APPOINTED COUNSEL
a/k/a EDITH GRUTAS,) Date: August 26, 2008 at 10 a.m.
RONALD NELSON,) Magistrate Judge Wayne D. Brazil
NELDA ASUNCION, and)
CRISTETA LAGAREJOS,)
Defendant.)

I. INTRODUCTION

Defendants Cristeta Lagarejos and Nelda Asuncion have not provided any legitimate justification to support their contention that, for the purpose of obtaining court-appointed counsel, they should be permitted to file financial affidavits *ex parte* and under seal, while denying the government the opportunity to review and challenge their financial disclosures in an open, adversarial proceeding. Moreover, the defendants' speculative assertions of the possibility of inadequate protection of their right against self-incrimination have been rejected by the Supreme Court and the Ninth Circuit as a basis for a Fifth Amendment claim. See, e.g., Seattle Times

1 Company v. United States District Court, 845 F.2d 1513, 1519 (9th Cir. 1988) In addition, the
 2 government's agreement to provide use and derivative use immunity will protect against any
 3 financial disclosures that the defendant "reasonably believes could be used in a criminal prosecution
 4 or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441,
 5 444-45 (1972). For the reasons set forth below, the defendants' arguments have no merit.

6 **II. ARGUMENT**

7 The Criminal Justice Act ("CJA") provides for the appointment of counsel only when the
 8 judge is "satisfied after appropriate inquiry that the person is financially unable to obtain counsel.
 9 18 U.S.C. § 3006A(b)." United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992). After a full
 10 exploration of the defendant's financial status, the courts are required to determine if a defendant
 11 has the financial ability to retain counsel, or whether partial payment for the services of an attorney
 12 is appropriate. See United States v. Barcelon, 833 F.2d 894, 898 (10th Cir. 1987).

13 The defendant bears the burden of proving inadequate financial means to obtain counsel.
 14 United States v. Ellsworth, 547 F.2d 1096, 1098 (9th Cir. 1976). As part of this burden, defendant
 15 "has the responsibility of providing the court with sufficient and accurate information upon which
 16 the court can make an eligibility determination." 7 Administrative Office of the United States
 17 Court, Guide to Judiciary Policies and Procedures § 2.03(C). The courts may "refuse to appoint
 18 counsel if it finds that the defendant's portrayal of financial inability lacks credibility" United States
 19 v. Barcelon, supra, 833 F.2d at 897 & n. 5 (collecting cases). An adverse decision to the defendant
 20 "will not be reversed unless clearly erroneous." United States v. Sarsoun, 834 F.2d 1358, 1363 (7th
 21 Cir. 1987) (en banc) (by blocking legitimate inquiry into his financial condition, defendant
 22 "impliedly waived his right to counsel").

23 "It is not enough to *claim* inability to hire a lawyer and back up the claim with an affidavit;
 24 the statute provides for 'appropriate inquiry' into the veracity of that claim . . . the public fisc need
 25 not contribute one penny unless the accused first establishes that he cannot afford counsel"
 26 (emphasis in original). United States v. Bauer, supra, 956 F.2d at 694-95.. Although the CJA does
 27 not further define an "appropriate inquiry," the procedure "necessarily varies with the circumstances
 28 presented, and no one method or combination of methods is required." See United States v.

1 Barcelon, supra, 833 F.2d at 897; United States v. Foster, 867 F.2d 838, 841 (5th Cir. 1989) (“No
2 particular method of determining the defendant’s means, however, is required by the Act. The
3 burden rests with the defendant to establish insufficient financial means to employ counsel”). In
4 submitting the Criminal Justice Act to Congress in 1963, Attorney General Robert F. Kennedy
5 stated:

6 the requirement of an ‘appropriate inquiry’ to determine the
7 defendant’s financial need is intended to assure that the court, *by
hearing, affidavit or other suitable investigation*, will scrutinize all
8 applications for representation (emphasis added).

9 H.R. Rep. No. 864, 88th Cong., 1st Sess., *reprinted in* 1964, U.S. Code Cong. & Admin. News 2990,
10 2996.

11 In addition to investigating the defendant’s assets, liabilities, income, and obligations, the
12 “courts have taken into account a broad range of additional considerations where warranted,”
13 including the needs of the defendant and his family, the amount the defendant posted as bail, the
14 expense and extent of legal services which the defendant requires, amounts given the defendant by
15 others for limited purposes only, whether the defendant has secreted assets, the availability of
16 income to the defendant from other sources such as a spouse, or trusts, estates, or the like, and
17 whether assets may be liquidated or otherwise available. See United States v. Barcelon, supra, 833
18 F.2d at 897 & n. 5 (collecting cases); see United States v. Schmitz, 525 F.2d 793, 794 (9th Cir.
19 1975) (inquiry includes transfers in trusts); United States v. Martinez-Torres, 556 F.Supp. 1275,
20 1277, 1279 (S.D.N.Y. 1983) (“Financial inability includes an inquiry into whether there is available
21 to defendant funds for his defense from other sources such as family, friends, trusts, estates, or
22 defense funds”; defendants failed to carry their burden of establishing that they were financially
23 unable to retain counsel).

24 In United States v. Salemme, 985 F.Supp. 197, 200 (D. Mass. 1997), the district court took
25 a bifurcated approach. The court “decided that in the first instance it will receive *ex parte*
26 submissions from the defendants and the government. If possible and appropriate, the court will
27 decide whether to appoint counsel based on those submissions. If those submissions indicate that
28 an adversary hearing is necessary or appropriate, the court will then provide the defendants use

1 immunity for their statements, order the exchange of the parties' submissions, and conduct that
2 hearing." As in Salemme, the government initially had suggested to the magistrate judge on
3 August 5, 2008 that the defendants and the government submit financial information *ex parte* for
4 the court's review. However, upon further reflection, the government revised its position and
5 argued that all parties should be provided with notice and an opportunity to rebut the other party's
6 claims and evidence in an open, adversarial proceeding (Government's Opposition). This is the
7 only approach that will result in a full and reliable portrayal of the defendants' financial status.
8 Moreover, without notice of the claims set forth in the defendants' financial affidavits, the
9 government would be placed in an untenable position of having to blindly weigh the risk of
10 providing an advanced viewing of substantial evidence concerning the defendant's assets and
11 income, most of which constitutes work product, against the risk of providing select, and thus
12 possibly inadequate, financial information to rebut the defendant's undisclosed claims. The district
13 court in United States v. Hilsen, 2004 U.S. Dist. LEXIS 20355 (S.D.N.Y. 2004), reached the same
14 conclusion in rejecting the defendant's suggestion that he and the government submit *ex parte*
15 information about his financial status. As the court stated,

16 Hilsen has also proposed that he be permitted to submit his CJA 23 *ex*
17 *parte* and the government permitted to submit opposition based on the
18 presumed contents of Hilsen's CJA 12, thus allowing the government
19 to be heard while still affording Hilsen protection. Acceptance of
20 Hilsen's proposal would lead to a proceeding that is neither truly
21 adversarial in the manner intended by the Harris court nor likely to
22 lead to a reliably fulsome factual picture, as the government, opposing
23 Hilsen's application without any knowledge of the assets or income
24 set forth in Hilsen's CJA 23, would perforce need to weigh the risk of
25 providing Hilsen with an advance viewing of all of its evidence
26 concerning his assets and income against the risk of proving select,
27 and thus possibly inadequate, information. A bifurcated approach
28 whereby each party submits material *ex parte* might resolve some of
the concerns just identified but would still run contrary to Harris to the
degree that true adversarial confrontation and the attendant benefits
would be lacking.

24 United States v. Hilsen, 2004 U.S. Dist. LEXIS 20355 *34-35; 2004 WL 2284388 *10 (S.D.N.Y).¹
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28 ¹ The government has cited to the unpublished decision in Hilsen only because defendant
Nelda Asuncion has cited to this case in her points and authorities filed on August 18, 2008.

1 There is a presumption of openness in criminal proceedings which originates from the First
2 amendment and common law. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509
3 (1984); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9-10 (1986) (*Press Enterprise II*).
4 Although closed proceedings are “not absolutely precluded,” they “must be rare and only for cause
5 shown that outweighs the value of openness.” Press-Enterprise I, 464 U.S. at 523; see United States
6 v. Kodzis, 255 F.Supp.2d 1140, 1145 (S.D.CA. 2003) (“The Supreme Court as well as the Ninth
7 Circuit have made clear that criminal proceedings are presumptively open. The public has an
8 appreciable interest in the criminal proceedings at issue here, where [defendant] requests that
9 counsel be appointed by the Court and paid for by the government”); United States v. Hilsen, supra,
10 2004 U.S. Dist. LEXIS 20355 *18 (“That the use of an adversarial proceeding might force the
11 defendant to make an ‘unappealing choice’ was not, in and of itself, an adequate reason to bar such
12 a proceeding”), citing United States v. Harris, 707 F.2d 653, 662 (2d Cir. 1983).

13 The United States respectfully submits that the presumption of openness in criminal
14 proceedings should be applied to any requests by the defendants in this case for court-appointed
15 counsel at the public’s expense, especially under circumstances where the defendants’ inability to
16 afford counsel has been placed into doubt. See United States v. Sarsoun, supra, 834 F.2d at 1363-
17 64 (the courts “are not required to conduct *ex parte, in camera* hearings to determine whether a
18 defendant is eligible for appointed counsel. . . a trial court may prefer an adversarial, rather than *ex
19 parte*, hearing so that *the government has an opportunity to object to the statements by the
20 defendants*”) (emphasis added); United States v. Harris, supra, 707 F.2d at 662 (it was not error for
21 the district court to find no indigency where the defendant declined to supply additional information
22 to the court unless the proceedings were held *in camera* and without the government’s
23 participation); United States v. Coniam, 574 F.Supp.615, 617 & n. 2 (D.Conn. 1983) (rejecting the
24 notion of *ex parte* proceedings as inconsistent with traditional adversarial proceedings and noting
25 that the CJA “does not mandate nor seemingly contemplate a closed presentation of financial
26 information,” the court concluded that the role of the government was “appropriately invited by the
27 approval of an adversarial process by which to insure the propriety of defendant’s receipt of services
28 of counsel under the CJA).

1 Defendants have not set forth any legitimate rationale under the facts, the law, or the United
2 States Constitution that would support that their financial affidavits to obtain court-appointed
3 counsel paid by public funds should be treated in any manner other than part of the public record.
4 The government has an obligation to assist the court in rendering a fully informed and accurate
5 decision on the issue of whether those defendants who seek court-appointed counsel have satisfied
6 their burden of proof.

7 Defendants Cristeta Lagarejos and Nelda Asuncion seek to submit financial affidavits, *ex*
8 *parte* and *in camera*, to deny the government the opportunity to review and rebut their claims on
9 the purported ground of a Fifth Amendment privilege. However, as set forth in the Government's
10 Opposition, neither the Supreme Court nor the Ninth Circuit has decided the issue of whether
11 requiring a defendant to submit financial information necessary to obtain court-appointed counsel
12 amounts to compulsion under the Fifth Amendment. See United States v. Kahan, 415 U.S. 239
13 (1974); Seattle Times Company v. United States District Court, 845 F.2d 1513, 1518 n. 4 ("This
14 court has not previously decided whether a defendant acts under state compulsion when he discloses
15 financial information in order to obtain appointed counsel"); United States v. Hitchcock, 992 F.2d
16 236, 239 (9th Cir. 1993) ("The Ninth Circuit has not decided the amount of protection such financial
17 disclosures should receive").

18 Moreover, assuming arguendo that the Fifth Amendment privilege applies to financial
19 disclosures to obtain court-appointed counsel, defendant must be faced with a "real and
20 appreciable," and not merely "imaginary and unsubstantial" threat of self-incrimination. See
21 Marchetti v. United States, 390 U.S. 39, 48 (1968); Seattle Times Company v. United States
22 District Court, supra, 845 F.2d at 1519 (defendant's "assumption is premature" that the contents
23 of the financial affidavits would incriminate him because "[w]e do not know what use, if any, the
24 government will try to make of the information contained in the affidavits"), quoting United States
25 v. Peister, 631 F.2d 658, 662 (10th Cir. 1980); accord, United States v. Harris, supra, 707 F.2d at
26 663 ('the speculative possibility of inadequate protection of defendant's fifth amendment rights is
27 outweighed by the need to determine facts through adversarial proceedings'); United States v.
28 Krzeske, 836 F.2d 1013, 1018-19 (6th Cir. 1988) ("it was proper for the district court to refuse to

1 appoint counsel until [defendant] proved his indigency . . . defendant should not be relieved of his
2 burden [to demonstrate financial inability] when any conflict with the Fifth Amendment is
3 speculative and prospective only"); United States v. Madrzyk, 990 F.Supp. 1004, 1007 (N.D.Ill.
4 1998) ("the Government should not be denied the opportunity to provide the court with information
5 contrary to [defendant's] financial affidavit, if any exists, because of the 'speculative possibility of
6 inadequate protection' of [defendant's] Fifth Amendment privileges. Therefore, the court denies
7 [defendant's] motion to conduct an ex parte, in camera hearing to determine appointment of
8 counsel, and to file his financial affidavit under seal"); see also United States v. Verdugo-Urquidez,
9 494 U.S. 259, 264 (1990) (although the Fifth Amendment may be invoked during pretrial
10 proceedings, "a constitutional violation occurs only at trial," as the privilege against self-
11 incrimination is fundamentally a trial right).

12 In its opposition, the government stated that, without conceding the issue of whether
13 financial disclosure for the purpose of obtaining court-appointed counsel falls within the scope of
14 the Fifth Amendment, it will agree in advance not to utilize the defendants' financial disclosures
15 in its case-in-chief (Government's Opposition, p. 7). Defendant Lagarejos contends that, even if
16 use immunity were granted, "the government would still have the information for use in developing
17 leads and other evidence" (Defendant's Points and Authorities, p. 5). However, defendant's
18 argument contradicts the Supreme Court's explicit holding that the granting of use and derivative
19 use immunity will protect against any disclosures that the defendant "reasonably believes could be
20 used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v.
21 United States, 406 U.S. 441, 444-45 (1972); see also United States v. Hilsen, supra, 2004 U.S. Dist.
22 LEXIS 20355 *34 (defendant's "mere speculation that the government may be able to develop leads
23 from information contained in his CJA 23" does not "justify the invocation of an ex parte
24 approach").

25 In Kastigar, the Supreme Court concluded that "immunity from use and derivative use is
26 coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to
27 compel testimony over a claim of the privilege. While a grant of immunity must afford protection
28 commensurate with that afforded by the privilege, it need not be broader. Transactional immunity,

1 which accords full immunity from prosecution for the offense to which the compelled testimony
 2 relates, affords the witness considerably broader protection than does the Fifth Amendment
 3 privilege " Id. at 453.

4 Consistent with Kastigar, transactional immunity under 18 U.S.C. §§ 6002 and 6003 does
 5 not apply to the issue at hand. Rather, the government will agree in advance that use and
 6 derivative use immunity will preclude it from using any of defendants' financial disclosures to
 7 obtain court-appointed counsel in its case-in-chief and evidence derived therefrom as an
 8 investigatory lead. The courts have been granting use immunity for disclosure of defendants'
 9 financial disclosures, which the Ninth Circuit has made clear should not be granted without the
 10 government's agreement in advance. See Seattle Times Company v. United States District Court,
 11 supra, 845 F.2d at 1518 n. 4.²

12 In sum, the defendants cannot arbitrarily exclude the government from participation in an
 13 open, adversarial proceeding based merely upon their say-so that their financial disclosures should
 14 be kept secret and not subject to the government's review. If this Court agrees that defendants have
 15 failed to demonstrate justification for an *ex parte, in camera* proceeding, the United States
 16 respectfully submits that the method for conducting an open proceeding is flexible. The
 17 government recommends as follows: (1) the government should be provided with a copy of any
 18 financial affidavit submitted by a defendant who seeks court-appointed counsel; (2) after the
 19 government has had the opportunity to review the financial affidavits, it will provide those
 20 defendants and this Court with its materials that are responsive to defendants' claims in their
 21 affidavits; (3) the parties can proceed by proffer at the next court proceeding; and (4) if additional
 22 evidence or clarification is necessary, inquiry of the defendants and/or other witnesses under oath
 23 by this Court and/or the parties may be conducted as determined by this Court. See, e.g., United
 24 States v. Deutsch, 599 F.2d 46, 49 (5th Cir. 1979) (at a full-blown hearing, the defendant not only

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 27 ² If this Court agrees with the government that use and derivative use immunity should be
 28 granted to those defendants who seek court-appointed counsel, but believes that the authority to
 grant such immunity falls within the jurisdiction of an Article III judge, the government would
 have no objection to preparing a proposed order for review by the assigned district court judge.

1 testified under oath that he was unable to pay for counsel, but the government presented a number
2 of witnesses concerning the defendant's financial status and the district court determined that
3 defendant had sufficient funds to retain counsel); United States v. Foster, supra, 867 F.2d at 841
4 (the trial judge offered to conduct an in-depth hearing regarding defendant's financial ability to
5 obtain counsel, but defendant waived his right to counsel).

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CONCLUSION

8 For all the reasons stated above, and in the government's original opposition, the United
9 States respectfully submits that this Court should (1) preclude any defendant who seeks court-
10 appointed counsel from filing a financial affidavit under seal, *ex parte* and *in camera*; (2) provide
11 the government and defendant with the opportunity to rebut the other party's claims and evidence
12 in an open, adversarial proceeding; and (3) upon the government's motion, grant use and derivative
13 use immunity to any defendant who asserts a colorable Fifth Amendment claim based upon the
14 defendant's financial disclosures to obtain court-appointed counsel.

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Respectfully submitted,

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8/20/08
Dated

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